

domicile elsewhere than in the Republic of Ireland, I am consequently obliged to hold that he has not succeeded in bringing himself within the jurisdiction of this Court so far as his Petition for a decree of dissolution of his marriage is concerned. Since my jurisdiction only arises if it is shown that both parties were domiciled in the Federation or the United Kingdom at the time of the presentation of the Petition I cannot make a decree of dissolution of marriage in favour of the petitioner; I can only give him a decree of judicial separation, and I order accordingly.

Order accordingly.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Gibb & Co.*

SZE HAI TONG BANK LTD. v. RAMBLER CYCLE CO. LTD.

[J.C. (Lord Denning, Lord Jenkins and the Rt. Hon. L. M. D. de Silva) June 22, 1959]

[Privy Council Appeal No. 20 of 1958]

Shipping — Bill of lading — Delivery of goods to consignee against written indemnity — Discharge without production of bill of lading — Carrier not responsible after discharge — Implied limitation — Fundamental breach under cloak of general exemption.

Contract — Bill of lading.

The respondents in this case shipped from England to Singapore on the s.s. *Glengarry* bicycle parts to the value of about £3,000 under a bill of lading requiring the goods to be delivered "unto order of his or their assigns," and which by clause 2, provided that "(c)..... the responsibility of the carrier...shall be deemed...to cease absolutely after they are discharged" from the ship. After the goods had been discharged in Singapore the carrier's authorised agent, in accordance with what was alleged to be the common practice in Singapore, released them to the consignee against a written indemnity by the latter's bank, the appellants, in favour of the carrier, but without production of the bill of lading. The consignee never paid for the goods, and on a claim by the respondents against the carrier for damages for breach of contract or for conversion the latter brought in the consignee and the appellant bank as third parties, claiming to be entitled to be indemnified by them. The appellants admitted liability to indemnify the carrier if the latter were held liable. The trial Court gave judgment for the cycle company and also made a declaration that the carrier was entitled to be indemnified by the third parties, and this decision was affirmed by the Court of Appeal, to whom only the bank had appealed. On further appeal to the Privy Council,

Held: (1) a shipowner who delivered without production of the bill of lading did so at his peril. In delivering the goods, without production of the bill of lading, to a person who, to its knowledge, was other than one entitled under the bill of lading to receive them, the carrier was liable for breach of contract and conversion, and was not protected by the exemption clause 2(c). The extreme width of that clause must be cut down by an implied limitation; it must be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract and at least so as not to permit the carrier deliberately to disregard its obligation as to delivery — to deliver against production of the bill of lading;

(2) a fundamental breach of obligations of a contract cannot be allowed to pass unnoticed under the cloak of a general exception clause.
Appeal dismissed.

Cases referred to:—

- (1) *Glynn v. Margetson & Co.* [1893] A.C. 351.
- (2) *G. H. Renton & Co. v. Palmyra Trading Corp. of Panama* [1956] 1 Q.B. 462 at p. 501, [1957] A.C. 149, at p. 164.
- (2a) *The Cap Palos* [1921] P. 458, 471.
- (3) *Chartered Bank of India, Australia & China v. British India Steam Navigation Co. Ltd.* [1909] A.C. 369.
- (4) *United Africa Co. v. Saka Owoade* [1955] A.C. 130.
- (5) *Bontex Knitting Works Ltd. v. St. John's Garage* (1944) 60 T.L.R. 44, 253.
- (6) *Alexander v. Railway Executive* [1951] 2 K.B. 882.
- (7) *Karsales (Harrow) Ltd. v. Wallis* [1956] 1 W.L.R. 936.
- (8) *Smackman v. General Steam Navigation Co.* (1908) 13 Com. Cas. 196.
- (9) *Ashby v. Tolhurst* [1937] 2 K.B. 242.
- (10) *Swan Hunter & Wigham Richardson Ltd. v. France Fenwick Tyne & Wear Co. Ltd.* [1953] 1 W.L.R. 1026.

PRIVY COUNCIL APPEAL. Appeal from a judgment of the Court of Appeal of the Colony of Singapore.

T. G. Roche, Q.C., and G. R. F. Morris, Q.C. for the appellants.

Sir David Cairns, Q.C., and Michael Kerr for the respondents.

Cur. Adv. Vult.

The judgment of their Lordships was delivered by

Lord Denning: The Rambler Cycle Company Limited manufacture bicycles in England and export them to various parts of the world, and in particular to Singapore, where they have customers called the Southern Trading Company. In 1954 these customers ordered bicycle parts to the value of nearly £3,000 from the Rambler Cycle Company. Payment was to be 90 days, documents against payment. The Rambler Cycle Company made the goods and sent them off to Singapore. They shipped the goods on the steamship "*Glengarry*," which belongs to Glen Line Limited, and they paid the freight in advance. The steamship company issued a bill of lading dated 30th July, 1954, in which they acknowledged that the goods were shipped by the Rambler Cycle Company and were to be conveyed by the ship "*Glengarry*" and were to be delivered at the port of Singapore "unto Order or his or their assigns." There was noted on the bill of lading a request by the Rambler Cycle Company saying: "Notify: Southern Trading Company, C Short Street, Singapore." The Rambler Cycle Company

insured the goods through Lloyds and obtained an insurance certificate. This covered the goods during the voyage and for 90 days thereafter. The Rambler Cycle Company also drew a bill of exchange on the Southern Trading Company for the amount due. This was payable 90 days after acceptance. The Rambler Cycle Company also made out an invoice for the goods. The Rambler Cycle Company took all these documents to the Bank of China in London, who passed them on to their branch in Singapore. This branch was to hold them until the bill of exchange was paid and also any charges.

On 1st September, 1954, the ship "Glen-garry" arrived in Singapore. The ship-owners had agents there called Boustead and Company, who acted for them in every way. On the authority of these agents, on the 2nd and 3rd September, 1954, the goods were discharged from the ship and placed in the go-downs of the Singapore Harbour Board. (This was done, no doubt, under clause 10 of the bill of lading "at the risk and expense of the owners of the goods"). These shipping agents also wrote to the Southern Trading Company to notify them of the arrival of the goods. The Southern Trading Company wished to get possession of the goods but did not want to pay for them at that time. So they went along to their own bank, the Sze Hai Tong Bank Limited, and got that bank to sign a form of indemnity in favour of the ship-owners, agreeing that, if the goods were released to the Southern Trading Company, they would indemnify the shipping company against any loss thereby occasioned. The indemnity was signed both by the Southern Trading Company and the Sze Hai Tong Bank and dated 3rd September, 1954. When the shipping company's agents received that indemnity, they authorised the Harbour Board to deliver the goods to the Southern Trading Company. The shipping company's agents never saw the bill of lading. It was not produced to them. It was, of course, still in the hands of the Bank of China, who would not deliver it except against payment. Yet the shipping company's agents issued a delivery order for the goods in favour of the Southern Trading Company. On 4th and 6th September, 1954, the goods were removed from the Harbour Board premises by the Southern Trading Company.

The shipping company's agents were quite frank about what they did. Their representative said in evidence: "In issuing delivery orders and in everything we do we act as agents for the Glen Line. It is an accepted fact that, in absence of bills of lading, goods are released on an indemnity. I agree we are supposed to deliver on the bill of lading being produced to us. I agree that, when we do not have the bill of lading produced, we cover ourselves by getting an indemnity. When it is suggested to me that we get these indemnities because we know we are doing what we should not do, I say that if no risk, we would not need indemnity. I agree we get indemnity because we are doing

A something we know we should not do, but it is common practice. It is an everyday occurrence. We rely on the bank's guarantee."

The Southern Trading Company never did pay for the goods. They did not pay the draft. The Rambler Cycle Company did not know the goods had been delivered to the Southern Trading Company. They assumed that the goods had remained in warehouse at Singapore. They arranged for the insurance to be extended beyond the 90 days for two further periods of 30 days each consecutively. Eventually, in January, 1955, they discovered what had happened and in August, 1955, they brought an action against the shipping company claiming damages for breach of contract or for conversion. The shipping company brought in the Southern Trading Company and the Sze Hai Tong Bank as third parties, claiming that they were entitled to be indemnified by them.

The action was tried by Whitton, J., in the High Court of Singapore. He gave judgment for the cycle company against the shipping company for £3,005 11s. 6d., and also made a declaration that the shipping company were entitled to be indemnified by the third parties. The shipping company did not appeal but the Sze Hai Tong Bank did so. The Court of Appeal of Singapore (Knight, Acting C.J. of Singapore, Thomson, C.J. of Malaya, and Chua, J.) dismissed the appeal. The Sze Hai Tong Bank now appeal to Her Majesty in Council. The contest before their Lordships has been solely whether judgment was properly entered against the shipping company: for if it was, the Sze Hai Tong Bank recognise they are bound to indemnify the shipping company.

It is perfectly clear law that a ship-owner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was "unto Order or his or their assigns," that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.

In order to escape the consequences of the misdelivery, the appellants say that the shipping company is protected by section 2 of the bill of lading, which says that: "During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea, the following terms and conditions shall apply to the exclusion of any other provisions in this Bill of Lading that may be inconsistent therewith, viz. (a) so long as the goods remain in the actual custody of the

carrier or his servants" (here follows a specified exception); "(b) whilst the goods are being transported to or from the ship" (here follows another specified exemption); "(c) in all other cases the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods, shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom."

The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both have said: "Of course not." There is therefore an implied limitation on the clause, which cuts down the extreme width of it: and, as matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for.

But their Lordships go further. If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has, as one of its main objects, the proper delivery of the goods by the shipping company, "unto order or his or their assigns," against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract. see *Glynn v. Margetson & Co.* ⁽¹⁾, at p. 357; *G. H. Renton & Co. v. Palmyra Trading Corporation of Panama* ⁽²⁾.

To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery. For that is what has happened here. The shipping company's agents in Singapore acknowledged: "We are doing something we know we should not do." Yet they did it. And they did it as agents in such circumstances that their acts were the acts of the shipping company itself. They were so placed that their

A state of mind can properly be regarded as the state of mind of the shipping company itself. And they deliberately disregarded one of the prime obligations of the contract. No court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause, see *The Cap Palos*. ^(2a)

B The appellants placed much reliance, however, on a case which came before their Lordships' Board in 1909 of *Chartered Bank of India, Australia and China v. British India Steam Navigation Company Ltd.* ⁽³⁾ There was there a clause which said that "in all cases and under all circumstances the liability of the Company shall cease when the goods are free of the ship's tackle." The goods were discharged at Penang and placed in a shed on the jetty. Whilst there a servant of the landing agents fraudulently misappropriated them in collusion with the consignees. Their Lordships' Board held that the shipping company were protected by the clause from any liability.

Their Lordships are of opinion that that case is readily distinguishable from the present, as the courts below distinguished it, on the simple ground that the action of the fraudulent servant there could in no wise be imputed to the shipping company. His act was not its act. His state of mind was not its state of mind. It is true that, in the absence of an exemption clause, the shipping company might have been held liable for his fraud, see *United Africa Company v. Saka Owode*. ⁽⁴⁾ But that would have been solely a vicarious liability. Whereas in the present case the action of the shipping agents at Singapore can properly be treated as the action of the shipping company itself.

The self-same distinction runs through all the cases where a fundamental breach has disentitled a party from relying on an exemption clause. In each of them there will be found a breach which evinces a deliberate disregard of his bounden obligations. Thus in *Bontex Knitting Works Ltd. v. St. John's Garage*, ⁽⁵⁾ the lorry driver left the lorry unattended for an hour, in breach of an express agreement for immediate delivery. In *Alexander v. Railway Executive*, ⁽⁶⁾ the cloak-room official allowed an unauthorised person to have access to the goods, in breach of of the regulations in that behalf. In *Kursales (Harrow) Ltd. v. Wallis*, ⁽⁷⁾ the agent of the finance company delivered a car which would not go at all, in breach of its obligation to deliver one that would go. In each of those cases it could reasonably be inferred that the servant or agent deliberately disregarded one of the prime obligations of the contract. He was entrusted by the principal with the performance of the contract on his behalf: and his action could properly be treated as the action of his principal. In each case it was held that the principal could not take advantage of the

exemption clause. It might have been different if the servant or agent had been merely negligent or inadvertent, see *Smackman v. General Steam Navigation Co.* ⁽⁸⁾; *Ashby v. Tolhurst* ⁽⁹⁾ at p. 253 by Sir Wilfrid Greene, M.R., and *Swan Hunter and Wigham Richardson Ltd. v. France Fenwick Tyne & Wear Co. Ltd.* ⁽¹⁰⁾ at pp. 1030-1032.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

Appeal dismissed.

Solicitors: *Lawrence, Messer & Co.; Ingle-dew, Brown, Bennison & Garrett.*

PUBLIC PROSECUTOR v. TAN KOOI CHOON

[A. Cr. J. (Smith J.) April 13, 1959]

[K. L. — Criminal Appeal No. 66 of 1958]

Fisheries Enactment, 1937 — Maintenance and use of fishing stake without licence — Fishing stake erected outside territorial waters — Fisheries Rules, 1938, r.2(i).

Waters and Watercourses — "Inland waters," "tidal waters" and "territorial waters" — Meaning of — Civil Law Ordinance, 1956, s.3 — English common law.

A person who maintains a fishing stake outside territorial waters is not maintaining a fishing stake in tidal waters for the purposes of the Fisheries Enactment, 1937.

In this case the respondent pleaded guilty to a charge of maintaining and using a fishing stake in tidal waters contrary to r. 2(i) of the Fisheries Rules, 1938 punishable under section 11 of the Fisheries Enactment, 1937. The evidence for the prosecution showed that the unlicensed fishing stake was found by the Deputy Fisheries Officer in the sea more than three miles from the nearest low water mark. On the facts the Magistrate refused to convict him, and he was discharged.

Held: the charge in this case was incorrectly framed in alleging an offence in tidal waters and the respondent was correctly discharged.

The expression "territorial waters" is not defined in the Enactment and must therefore be taken to have the normal meaning assigned to it in English common law by virtue of section 3 of the Civil Law Ordinance, 1956. Territorial waters extend from low water mark to three miles out from the shore. Inland waters, by definition, are all rivers, etc. for that portion of their watercourse which is beyond the influence of tides. The logical inference is that tidal waters relate to that part of the sea from low water mark to high water mark and inland as far as the tide flows and reflows.

MAGISTRATE'S CRIMINAL APPEAL.

Mohamed Salleh bin Abas (Federal Counsel) I for the appellant.

Respondent in person.

Smith J.: This is an appeal by the Public Prosecutor against the discharge of the respondent. The respondent was charged with the following offence:—

"That you on 25.5.58 at about 12.45 p.m., did maintain and use a fishing stake to wit a Blat Pok in tidal waters off Bagan Nakhoda Omar without a licence from the Officer-in-Charge contrary to Rule 2(i) of the Fisheries Rules, 1938, and punishable under section 11 of the Fisheries Enactment No. 20 of 1937."

The facts are that a Deputy Fisheries Officer was making a survey of fishing stakes at sea off Bagan Nakhoda and Sungei Pulai. He found an unlicensed fishing stake in the sea more than three miles from the nearest low water mark. From the map it appears the offence was not committed within an arm of the sea.

The respondent pleaded guilty to the charge but the learned Magistrate refused to convict on the ground that he had no jurisdiction. In his grounds he states:—

"As far as the Court is aware the territory of the State of Selangor off the coast is that part of the sea adjacent to the coast thereof which by international law constitutes the territorial waters of the State and that is the three miles limit. The Court cannot trace any law whereby jurisdiction may be exercised beyond territorial limits in respect of an offence under the Fisheries Enactment 1937. The Court therefore discharged the defendant."

The Enactment under which conviction is sought is one of the State of Selangor. The Fisheries Enactment, 1937, includes the following rule-making power:—

"14. (i) The Ruler in Council of each State may in respect of the State of which he is Ruler make rules for the purposes of this Enactment and not inconsistent with any of the provisions of this Enactment.

(ii) In particular and without prejudice to the generality of the foregoing power such rules may —

(a) regulate or prohibit except under or in accordance with the conditions of a licence the erection maintenance working repair and lighting of fishing stakes;

(b) regulate or prohibit except under or in accordance with the conditions of a licence any method of fishing or the use of fish traps or fishing nets;

(f) prescribe the areas within or without territorial waters or within tidal waters or within inland waters and the periods of time within which any particular method of fishing is prohibited or restricted."

In exercise of those powers the Ruler of the State of Selangor made the Fisheries Rules, 1938, which include the following Rule 2(i):—

"No person shall in tidal or inland waters erect, maintain, use or have in his possession any kind of . . . fishing stake . . . except under and in accordance with the terms of a fishing licence from the Officer-in-Charge."

The expression "inland waters" is defined in section 2 of the Enactment in the following terms:—

"'inland waters' includes all rivers creeks and streams for that portion of their water-course which is beyond the influence of tides and also fresh water lakes lagoons and ponds whether private or otherwise."

The expression "tidal waters" is defined in section 2 of the Enactment in the following terms:—

"'tidal waters' includes the sea and all rivers creeks streams lagoons ponds and other waters whether private or otherwise as far as the tide flows and re-flows."

The expression "territorial waters" is not defined in the Enactment at all and must there-